OREGON NATURAL RESOURCES COUNCIL ACTION
OREGON NATURAL DESERT ASSOCIATION

IBLA 98-464 Decided April 12, 1999

Appeal from a decision of the Lakeview (Oregon) Resource Area Office, Bureau of Land Management, issuing an allotment management plan and final environmental impact statement. OR 010-98-01.

Stay Denied; Motion to Dismiss Granted and Appeal Dismissed; Motion to Intervene Denied as Moot.

1. Federal Land Policy and Management Act of 1976: Land-Use Planning--Grazing Permits and Licenses: Adjudication--Rules of Practice: Appeals: Stay

   An Allotment Management Plan is an activity level document that implements land-use decisions made in a Resource Management Plan or Management Framework Plan. An appeal of an Allotment Management Plan which challenges a land-use decision to allow grazing and to what extent is not likely to succeed on the merits and will not support a stay.

2. Grazing and Grazing Lands--Grazing Permits and Licenses: Adjudication--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Statement of Reasons

   The Department's rules of practice require that a statement of reasons for appeal must affirmatively point out error in the appealed decision. Where a statement of reasons enumerates only arguments that pertain to an appeal of a grazing management decision that is pending before an Administrative Law Judge, and where the statement of reasons does not allege or identify specific error in the general land management decision pertaining to the grazing allotment, it is appropriate to dismiss the appeal.

APPEARANCES: Gary R. Clarke, Esq., Eugene, Oregon, for Appellants; Elaine Y. Zielinski, Oregon State Director, for the Bureau of Land Management; Adam T. Reeves, Esq., William Perry Pendley, Esq., Mountain States Legal Foundation, Denver, Colorado, for MC Beaty Butte Grazing Association.

OPINION BY ADMINISTRATIVE JUDGE PRICE

The Oregon Natural Resources Council Action and the Oregon Natural Desert Association (ONDA) have appealed from the decision of the Lakeview (Oregon) Resource Area Office, Bureau of Land Management (BLM), implementing the Beaty Butte Allotment Management Plan and Final Environmental Impact Statement (AMP/FEIS) as outlined in a Record of Decision (ROD) dated July 24, 1998. The ROD consists of two types of determinations. Most of the ROD pertains to proposed grazing management determinations which thus are subject to protest pursuant to 43 C.F.R. § 4160.2 and thereafter appealable before an Administrative Law Judge pursuant to 43 C.F.R. § 4160.4. In its Response to Appellants' Request for a Stay, Response to Statement of Reasons (SOR), and Motion to Dismiss (BLM Response), BLM notes that this portion of the ROD is relevant to issuance of a 10-year grazing permit issued to the MC Beaty Butte Grazing Association (Association), the owner of the base property to which the grazing preference for the Beaty Butte Allotment (Allotment) is attached. The permit incorporates the AMP/FEIS as terms and conditions thereof, and includes, among other things, rest-rotation grazing schedules, fencing and exclosures, watering facilities, vegetation evaluation and reseeding activities. 1/

The other aspect of the ROD is the Final General Land Management Decision, which, as such, was directly appealable to this Board pursuant to 43 C.F.R. § 4.410(a). This land management decision, a relatively minor portion of the AMP/FEIS, identified 16 prescribed burns throughout the Allotment and an erosion control project. These are depicted on Map 1 and described in Appendix 1 to ROD.

Appellants timely appealed, and accordingly, the appeal of the Proposed Grazing Management Decision is presently pending before the Hearings Division of the Office of Hearings and Appeals. Before this Board, Appellants filed a consolidated Notice of Appeal (NA), SOR, and Request for Stay of the decision in its entirety pursuant to 43 C.F.R. §§ 4.21 and 4.470. 2/ A request for stay of grazing decisions on appeal before an

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1/ The 10-year permit was issued on Dec. 29, 1992, which decision Appellants appealed. The appeal was assigned to Administrative Law Judge Ramon Child, who ultimately granted BLM's motion to dismiss. Appellants filed an appeal with this Board, which was docketed as IBLA 93-672. In disposing of that case, we dismissed ONDA's appeal, vacated Judge Child's order, set aside BLM's decision, and remanded the case for further action. Oregon Natural Resources Council, 129 IBLA 269 (1994). After remand, a final decision on the permit was issued on Jan. 25, 1995, and Appellants again appealed. The Association was issued an annual authorization to graze cattle, and Appellants appealed this decision as well. On June 29, 1998, Administrative Law Judge William E. Hammett remanded these appeals to the agency so that BLM could issue the ROD and AMP/FEIS that are the subject of IBLA 98-464. (BLM Response at 2-3.)

2/ We will refer to this consolidated pleading as the NA for purposes of citing pages of the document, but we will discuss the individual pleading contained within the NA as it is captioned.

Administrative Law Judge is properly made to the Office of Hearings and Appeals and directed to this Board. 43 C.F.R. §§ 4160.3 and 4160.4. Appellants subsequently amended their Request for Stay by deleting the prescribed burns on units 6, 7, and 8 of the Allotment from the scope of the Request for Stay. We note that Appellants' SOR and Request for Stay otherwise fail to differentiate between the grazing and general land management portions of the decision.

The standards for evaluating a request for stay are the same in both contexts, however. As set forth in 43 C.F.R. § 4.21(b), a party must demonstrate that a stay is justified based on the relative harm to the parties, the likelihood of success on the merits, the likelihood of immediate and irreparable harm to the moving party if the stay is not granted, and whether granting the stay is in the public interest. The burden to show that issuance of a stay is justified under the rule, each element of which must be established, rests with the Appellants. 43 C.F.R. § 4.21(b)(1); Clay Worst, 128 IBLA 165, 166 (1994); Jan Wroncy, 124 IBLA 150, 151-52 (1992).

As to the Proposed Grazing Management Decision, Appellants first argue that the relative harm to the parties favors granting the stay. Anticipating that the Association would seek party status, it is asserted that the Association does not possess a grazing permit, and even if it did possess a permit, the Association has alternatives to use of the public lands, and that any economic loss can be spread among its members. Therefore, it is argued, a stay will not harm the Association, whereas if it is not granted, the Allotment will deteriorate further, new fences will be constructed, new pastures will be created, grazing will hasten noxious weed trends, and rare plants and animals will be adversely affected. (NA at 2-3.) As BLM points out in its Response, the Association is authorized to graze the Allotment, as provided in 43 C.F.R. § 4160.3(c) (1994), the regulation in effect when the decision to issue a 10-year permit was issued. That regulation provided that a final grazing decision that was appealed was suspended pending final action on the appeal, and that where grazing has been authorized in the preceding year, it could continue at that level during the pendency of the appeal. The grant of a stay therefore would not, as BLM observed, eliminate grazing on the Allotment. Furthermore, Appellants' allegations of harm, unsupported by specific references, detailed discussion, data or evidence, do not constitute an adequate showing of relative harm. Thus, while it appears that new fences will be constructed to divide existing pastures into smaller pastures, we are unable to agree, given the other mitigating strategies identified in the AMP/FEIS, and the lack of claims of specific harm, that the implementation of Alternative 4 (or Alternative 2 if the jurisdictional transfer contemplated by Alternative 4 does not materialize) will result in the general harm alleged.

Appellants next argue that they are likely to succeed on the merits, based on their belief that BLM did not consider an adequate range of alternatives and did not seriously consider the no grazing alternative (Alternative 5). In addition, it is contended that BLM failed to consider an "adequate range of AUMs [Animal Unit Months]." (NA at 3.) In support of these arguments, Appellants refer to sections I and II of their SOR.

Section I consists of the assertion that the preferred alternative properly must be compared to the no grazing alternative and not to the no action alternative, which addresses the current condition of the Allotment. In section II, Appellants challenge the FEIS on the ground that BLM failed to consider alternatives in which fewer AUM's are allocated to grazing. According to Appellants, all the alternatives considered, excluding the no grazing alternative, assumed the total allocation of 26,121 AUM's would be utilized. (NA at 4.)

To succeed in demonstrating a likelihood of success on the merits, Appellants must make a persuasive showing that the FEIS was premised on "a clear error of law, a demonstrable error of fact or that the analysis failed to consider a substantial environmental question." Independent Petroleum Association of Mountain States, 136 IBLA 279, 284-85 (1996); Glacier Two-Medicine Alliance, 80 IBLA 133, 140-41 (1985). We find that Appellants' arguments lack merit factually and legally. BLM considered 10 alternatives in the course of preparing the AMP, including 5 alternatives which were eliminated from detailed analysis. These were (1) reinstating suspended nonuse; (2) retiring suspended nonuse; (3) intensive development of the Allotment; (4) continuing present interim management; and (5) instituting a 12-pasture, 2-herd modified rest rotation. (ROD at 1; AMP/FEIS at 15-16.) These were not studied further for good reason. For example, the possibility of retiring 14,466 AUM's of suspended nonuse was rejected because applicable regulations require the permittee to formally relinquish the nonuse. What is more important, however, is BLM's conclusion that this alternative would have no effect on the assessment of impacts associated with the five alternatives analyzed in detail. (AMP/FEIS at 13.)

Similarly, the second possible alternative was eliminated because the additional fencing and proposed projects would be situated within wilderness study areas (WSA's), which presents additional management issues, given the constraints on activities and improvements in such areas. (AMP/FEIS at 14.) The deletion of the remaining possible alternatives is supported by equally sufficient reasons, and accordingly, we reject the argument that BLM failed to consider an adequate number of alternatives.

The AMP/FEIS shows that the remaining five alternatives were considered in detail, including the no grazing alternative that Appellants favor. Furthermore, the detailed analysis was supported by a thorough evaluation of the Allotment that was completed in 1994. We again note that Appellants do not specifically challenge any of the data, methodology or conclusions contained therein, nor have they proffered or submitted any countervailing data or evidence of their own. Thus, as a factual matter, it is clear that Appellants' arguments simply are not supported by the record herein, and that BLM considered an adequate range of alternatives, including a no grazing alternative.

[1] The basis of Appellants' contentions stems from the assumption that the AMP is the appropriate juncture at which to consider and decide whether to allow grazing and to what extent. Notwithstanding their view of the planning and management process, however, the AMP is an activity level document that implements the land-use planning and decisions made

in a Resource Management Plan (RMP) or Management Framework Plan (MFP), 3/ in this case the 1983 Warner Lakes MFP. This Board lacks jurisdiction to consider an appeal from the approval or amendment of an RMP and gains jurisdiction only when BLM acts to implement the planning decisions made in the RMP. Colorado Environmental Coalition, 130 IBLA 61, 65 (1994); Wyoming Independent Producers Association, 133 IBLA 66, 79 (1995); Lands of Sierra, Inc., 125 IBLA 15, 20 (1992); Headwaters, Inc., 101 IBLA 234, 237-38 (1988).

An RMP (or a conforming MFP) is a document that establishes, among other things, "[a]llowable resource uses (either singly or in combination) and related levels of production or use to be maintained." 43 C.F.R. § 1601.0-5(k)(2). In addition, it specifies the "[r]esource condition goals and objectives to be attained." 43 C.F.R. § 1601.0-5(k)(3). In contrast, the objective of the AMP was to "specify resource goals and objectives specific to the allotment." (AMP/FEIS at 1.) Thus, whether to allow grazing and at what levels is clearly beyond the scope of an activity level plan such as an AMP. Moreover, a decision to reverse or modify a decision made in an RMP or MFP requires a formal amendment thereof, which a party may request. 43 C.F.R. §§ 1610.5-3(c); 1610.5-5; 1610.5-6; 1610.8(3)(ii). Joel Stamatakis, 98 IBLA 4, 7 (1987). Indeed, the regulations require that an AMP shall be consistent with the RMP or conforming MFP. 43 C.F.R. § 1610.5-3 (a). Finally, a decision or action which completely eliminates a principal use for 2 or more years and involves 100,000 acres or more shall be reported to the Congress before it can be implemented. 43 C.F.R. § 1610.6. The no grazing alternative was included in the analysis for purposes of comparing and assessing impacts only. (AMP/FEIS at 119, BLM Response Exh. 13.) In Appellants' view, this demonstrates that BLM never intended to seriously consider a no grazing alternative. However, a no grazing alternative plainly is not consistent with the MFP, a fact that Appellants do not challenge, and thus we find no fault in including the no grazing alterative to ensure a thorough analysis of impacts. As a result, Appellants are in error in asserting that the proper basis of comparison is the no grazing alternative rather than the no action alternative. It is apparent that Appellants would prefer to see no grazing on the Allotment, but their strong difference of opinion does not compel a finding that they are likely to succeed on the merits. Since BLM was not required to decide to amend the existing land-use plan, we find that Appellants have failed to carry their burden.

With respect to the likelihood of immediate and irreparable harm if the stay is not granted, Appellants contend that because the Allotment contains several WSA's, the construction of new fences and "other actions" would result in "noticeable negative impacts on wilderness values." (NA at 3.) They further argue that a number of sensitive species will be

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3/ The MFP is the precursor of the RMP, and until it is superceded by an RMP, may serve as the basis for various land management and planning decisions, provided it is consistent with the principle of multiple use and sustained yield and was developed with public participation and governmental coordination. 43 C.F.R. § 1610.8. In the present case, there is no material difference between an MFP and an RMP.

"adversely affected," and wildlife movement will be impeded by the new fences. As an initial matter, it should be noted that the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1994), specifically authorizes the continuation of mining, mineral leasing, and grazing in the same manner and degree as it was being conducted on October 21, 1976, provided the Secretary takes the steps necessary to prevent undue or unnecessary degradation of the lands and their resources. Our review of the AMP/FEIS persuades us that it is designed to prevent undue or unnecessary degradation of the Allotment to provide better resource management.

In response to the argument that the fence projects will cause noticeably negative impacts, BLM acknowledges significant impacts to the Spaulding and Hawk Mountain WSA's if two projects are completed. However, those projects are to be delayed until the WSA's are either withdrawn from further study or the policy governing management of such areas is revised. (BLM Response at 5; ROD at 8.) BLM further acknowledges impacts to migrating wildlife, but argues that the planned mitigation strategies will minimize such impacts, so that impacts are not significant. The specific measures are set forth in the AMP/FEIS at 15, 63-64 and in the ROD at 7 and in Appendix 1-11 thereto, and these were developed in consultation with the Oregon Department of Fish and Wildlife and the U.S. Fish and Wildlife Service. As Appellants' arguments only generally allege adverse impact without addressing the positive impacts of the mitigation measures or showing demonstrable error in adopting them, we conclude that they have also failed to carry their burden with respect to this element of the test for granting a stay.

The final element to be considered in weighing whether to grant a stay is whether the public interest favors it. Appellants' showing in this regard consists of the assertion that "[i]n the absence of grazing, the land will support the broadest public values," and that denying the stay will "enrich one group of permittees at the expense of the general public." (NA at 4.) Appellants' statement reflects only their strong conviction that grazing is not a worthy or legitimate use of the public lands. Moreover, as stated above, a stay will not end grazing on the Allotment, and thus we find that Appellants' showing is not persuasive.

While Appellants have touched upon each of the four elements that must be shown before a stay may issue, their allegations are either erroneous as a matter of law or mere conclusions lacking an adequate factual or evidentiary foundation, and as such, they do not demonstrate entitlement to the requested relief or error in the BLM decision under review. Therefore, their request for a stay of the Proposed Grazing Management Decision is denied.

[2] We now take up the Motion to Dismiss. Appellants' SOR consists of contentions that pertain only to the Proposed Grazing Management Decision and largely echo those made in support of the requested stay. Thus, it is asserted that the decision does not consider the no grazing alternative (SOR at 4-5); it fails to address forage allocation or vary the grazing preferences (SOR at 5); fails to evaluate whether the Allotment is chiefly suitable for grazing (SOR at 5); reflects a narrow definition of multiple use and sustained yield (SOR at 6); and incorrectly assesses the

economic impacts of the alternatives (SOR at 6.) However, Appellants have not made even a colorable attempt to address the prescribed burns or the erosion control project that comprise the General Land Management Decision. As we have said, appeal of the grazing management decision is not before this Board, as it is presently pending before an Administrative Law Judge. Having failed to allege or identify specific error in the General Land Management Decision, it is appropriate to grant the motion to dismiss the appeal. Shogun Oil Ltd., 136 IBLA 209, 212 (1996); In Re Eastside Salvage Timber Sale, 128 IBLA 114, 116 (1993). The associated Request for Stay relative to this portion of the decision is therefore denied as moot. Insofar as the Motion to Dismiss is intended to or may relate to the Proposed Grazing Management Decision, it is properly presented to the Administrative Law Judge for decision pursuant to 43 C.F.R. § 4.470(d).

In light of the disposition of this appeal, the Association's Motion to Intervene is denied as moot, without prejudice to a similar motion before the Administrative Law Judge.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Request for Stay of the Proposed Grazing Management Decision is denied; the Motion to Dismiss the appeal of the General Land Management Decision is granted; the Request for Stay of the General Land Management Decision is denied as moot; and the Motion to Intervene is denied as moot.

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T. Britt Price
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge